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In the Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 89.

J. ROBERT COGEN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

SANFORD H. COHEN,
Attorney for Petitioner.

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In the Supreme Court of the United States.

OCTOBER TERM, 1928.

J. ROBERT OGDEN, Petitioner, vs. THE UNITED STATES OF AMERICA.	No. 89

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement of the Case.

On May 4th, 1927, at 1435 Madison Avenue, New York City, prohibition agents without a warrant of any kind searched the person of the petitioner and found various papers. These they seized (R. 8, 9). Some or all of these papers were delivered to the United States Attorney.

Sometime later, it does not appear when, petitioner and others were indicted in the District Court of the United States for the Southern District of New York on a charge of conspiracy. While this indictment was pending petitioner applied in that Court for the return of the papers seized and for the suppression of evidence that the United States Attorney might have obtained therefrom, alleging that the search and seizure had been in violation of his Constitutional Rights (R. 12, 13).

This application was heard by the Hon. Frank J. Coleman, and by him denied in an order of Court dated January 12th, 1928 (R., 12).

From this order petitioner took a writ of error to the United States Circuit Court of Appeals for the Second Circuit. (Judicial Code, Section 128).

The Court of Appeals on February 20th, 1928, dismissed the "appeal" (Act of January 31st, 1928) on the sole ground that the order of the District Court was interlocutory and not appealable. The merits were not discussed. The opinion of the Court was by Judge Learned Hand (R., 15, 16, 17). Judge Manton wrote a concurring opinion (R., 18, 19).

Thereafter the petitioner applied to this Court for writ of certiorari by petition filed March 9th, 1928, which was granted on April 23rd, 1928, file No. 33,285 (R., 20), and so the case comes on to be heard here.

Single Question Presented.

Is an order of a District Court granting or refusing an application for the return of seized property, not involving the vacating of a Search warrant and made during the pendency of a criminal charge against the applicant, final and appealable?

Facts.

The person of the petitioner herein was searched by prohibition agents on May 4th, 1927, without a warrant. The agents found and seized various papers and delivered them to the United States Attorney for his use in prosecuting petitioner.

Thereafter petitioner and others were indicted in the United States District Court for the Southern District of New York on a charge of conspiracy.

While this indictment was pending petitioner (only) applied to the District Court for the return of the papers and for the suppression of evidence obtained therefrom on the ground that the search and seizure had violated his Constitutional Rights.

The above facts are not in dispute. The only disputed questions of fact were whether the arrest was before or after the search and whether any violation of law had been committed in the presence of the agents.

The petitioner insisted the search preceded the arrest (R., 31); the agent that he searched after the arrest (R., 7).

The petitioner quoted testimony of the agent that he did not commit any violation of law in the presence of the agent (R., 4).

An order denying this application was entered in the District Court on January 12th, 1928 (R., 12).

*Petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit upon the ground that the District Court erred in making said order upon the grounds set forth in the assignment of errors (R., 14). The merits were not discussed but the appeal was dismissed by the Circuit Court of Appeals. That Court in its opinion stating that the District Court order was interlocutory and not appealable (R., 15, 16, 17, 18, 19).

*Petitioner actually proceeded by writ of error. Apparently in view of the Act of January 31, 1928 the C. C. A. dismissed the "appeal". To avoid confusion of names the word "appeal" will be used exclusively herein to describe the review proceeding.

Argument.

I.

The issue as to how witnesses have obtained possession of papers or other articles of personal property is collateral to a criminal case.

A defendant in a criminal case who claims that papers or other articles of personal property have been seized in violation of his rights under the Constitution cannot wait until the trial of the cause and then seek its suppression. He must move before the trial to have the property returned to him "as not subject to seizure" and the evidence suppressed, "except where there has been no opportunity to present the matter in advance of trial".

> *Segurola* vs. *United States*, 275 U. S. 106, 10 S. Ct. 77;
> *Gouled* vs. *United States*, 255 U. S. 298, 305;
> *Amos* vs. *United States*, 255 U. S. 313, 316;
> *Agnello* vs. *United States*, 269 U. S. 20, 34.

The reason assigned for this method of procedure is that such matter is collateral to the issues of the indictment. The issue "as to the source of competent evidence" is in no sense a part of the indictment and is a wholly independent matter.

> *Segurola* vs. *United States*, *supra*.

There has, therefore, become imbedded in the criminal procedure of the United States Court a motion for the return of seized papers or articles; the purpose of such motion being to make it unnecessary to delay a trial to consider such collateral matter.

Segurola vs. *United States, supra*, where the Court said:

> "* * * The court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which happened to cross the path of such litigation and which is wholly independent of it. In other words in order to raise the question of illegal seizure, and an absence of probable cause in that seizure, the defendants should have moved to have the liquor returned to them as their property and as not subject to seizure or use as evidence."

II.

The order of the District Court was final and appealable.

The term "final order" is not necessarily limited to such "decisions or decrees which finally determine all the issues presented by the pleadings". They also "apply to a final determination of a collateral matter distinct from the general subject of litigation, affecting only the parties to the particular controversy, and finally settles that controversy".

> *Brush Elec. Co. vs. San José Electric Imp. Co.*, 51 Fed. 557, 2 C. C. A. 373.

In that case as indicated by the headnote, it was held: "that, as the motion presented questions of law and fact not presented in the bill of complaint, an order overruling it was a 'final decision', within the meaning of the act * * *".

At bar the motion was of a collateral matter involving questions of law and fact not presented in the indictment, affected only one of the defendants (Cogen) and finally settles the controversy as to whether the seizure of the papers was in violation of the petitioner's Constitutional Rights.

The petitioner's contention is that such a motion is a special proceeding and if indictment is pending it is a special proceeding in the criminal case, and the order on the application finally determines the rights of the parties in the subject matter.

The Court below lays stress upon the fact of the pendency of the criminal proceeding as indicative that the motion was but a step in the criminal case (R., 16). In the opinion (R., 16) the Court states it attaches "no significance to the way in which the papers are entitled", but it would seem that some attention was paid to the title.*

The title has no bearing on whether a proceeding is independent or a step in another proceeding. One of the cases relied on by the concurring opinion (R., 18, 19) in the Court below confirms that view. *Goodrich Lumber & Supply Co.* vs. *United States*, 259 Fed. 847. There the Court said:

> "A defendant cannot make an interlocutory order final by the choice of any particular form of title."

The question then is, Was the order actually interlocutory or final?

Prior to the decision of this Court in *Steele* vs. *U. S. No. 2*, 267 U. S. 505, 507, the Circuit Court of Appeals for the Second Circuit had determined that an order

*The papers at bar are actually entitled as a separate special proceeding and the title of the Criminal Proceeding is added to indicate in which matter the seizure arose.

for the quashing of a Search Warrant and for the return of the articles seized was interlocutory and not appealable. *Coastwise Lumber & Supply Co.* vs. *U. S.*, *supra*. Singularly the reasoning of the Court in that case is similar to the reasoning by the Court at bar and the Court in its opinion (R., 17) recognizes the difference created by the decision of *Steele* vs. *U. S.*, *supra*. The fact that the order at bar did not involve a search warrant proceeding is seized upon as a distinguishing feature (R., 17).

Steele v. United States Was Misunderstood by the Court Below, as its Opinion Shows.

In the *Steele* case the applicant's property had been seized under a search warrant issued by a commissioner. After the seizure the warrant was traversed by Steele, but the commissioner sustained the warrant. Steele was later indicted, and then he applied to the District Court for an order vacating the search warrant and returning the property seized thereunder. This application was denied by a judge of the District Court who was *not* the judicial officer who had issued the warrant. Steele appealed from the order denying the application, and this Court reviewed the matter on the merits.

Now the opinion of the Court below shows that it misunderstood the *Steele* case. It said (R., 16):

> "Under Section 16 of the Search Warrant Act upon the return of the executing officer the judge or commissioner allowing the writ is to restore property unlawfully seized. Such an order was treated *sub silentio* as a 'final decision' in *Steele* v. *United States*. * * *."

But the order appealed from was *not* the order of the judge or commissioner who had allowed the writ. A

commissioner had allowed the writ but the order appealed from was made by a judge in a proceeding brought in the District Court, and in the criminal case.*

Thus in the *Steele* case an order refusing to return seized property, the order having been made in a special proceeding in the criminal case, indictment pending, was reviewed on appeal—and the case is misunderstood by the Court below, which thinks that the order appealed from was the order of the judge who allowed the writ, and made by that judge in the course of proceedings provided for in the Espionage Act and described on page 501 of 267 U. S.*

In *Trustees* v. *Greenough*, 105 U. S. 527, plaintiff sued to set aside certain fraudulent conveyances. A fund came into the hands of the Court and its distribution was objectionable to plaintiff. The litigation being undetermined, he appealed from an order of distribution. This Court said:

> "The order is certainly a final one of the particular matter arising upon the petition for allowance. Though incidental to the cause, the inquiry was a collateral one, and receiving a final decision that the main suit might continue for years. We think the proceedings may be regarded as so far independent as to make the decision substantially a final decree for the purpose of an appeal."

*The docket of the District Court in the *Steele* case shows the following entries:

October 20, 1923—Information Filed. (Possession of Intoxicating Liquor)
October 22, 1923—Defendant Pleads Not Guilty.
October 31, 1923—Motion to set aside and Vacate Search Warrant and for the return of Property Returnable Nov. 5th, 1923.
November 7, 1923—Motion Denied—Wenslow, J.
March 12, 1924—Trial—Verdict Guilty—Fine $500.00.

*These facts are not entirely clear from the opinion of the Court, but counsel has examined the record and can assure this court that the facts here stated are correct.

In *Williams* v. *Morgan*, 111 U. S. 699, the Court, speaking of an appeal from an order fixing the fee of a trustee in an unfinished case, said:

> "It was in its nature final, and was made a matter distinct from the general subject of litigation."

In *Brush* v. *Electric Imp. Co.*, 51 Fed. 557 (C. C. A. 9th), a plaintiff who had unwillingly been joined as a party, moved to dismiss and this motion was overruled. Upon appeal the Court said:

> "We reach the conclusion that the term 'final decision' in said statute under consideration does not mean necessarily such decisions or decrees only which finally determine all the issues presented by the pleadings; that, while these are undoubtedly final decisions, the terms are not limited to them, *but also apply to a final determination of a collateral matter distinct from the general subject of litigation, affecting only the parties to the particular controversy, and finally settles that controversy.*"

The Court held the order appealable.

This doctrine has recently been affirmed in *United States* vs. *River Rouge Co.*, 269 U. S. 411, 414, where the Court said:

> "While the general rule requires that a judgment of a Federal Court shall be final and complete before it may be reviewed on a writ of error or appeal, it is well settled that an adjudication final in its nature as to a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation * * *."

In this case the controversy as a whole is between the United States on one hand, and Cogen and others on the other, and the issue is whether the defendants are guilty of the crime of conspiracy.

Such being the general controversy, this particular matter is to determine, and only determine whether the United States Attorney or Cogen is rightfully entitled to certain seized papers.

In *Forgay* vs. *Conrad*, 6 How. 201, 203, 204, 12 L. Ed. 404, the Court said:

> "The question upon the motion to dismiss is whether this is a final decree, within the meaning of the Acts of Congress. Undoubtedly, it is not final, in the strict, technical sense of that term. But this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the Legislature."
>
> "And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed.
>
> "This rule, of course, does not extend to cases where money is directed to be paid into court, or property to be delivered to a receiver, or property held in trust to be delivered to a new trustee appointed by the court, or to cases of a like descrip-

> tion. Orders of that kind are frequently and necessarily made in the progress of a cause. But they are interlocutory only, and intended to preserve the subject matter in dispute from waste or dilapidation, and to keep it within the control of the court until the rights of the parties concerned can be adjudicated by a final decree. The case before us, however, comes within the rule above stated, and the motion to dismiss is therefore overruled."

In *Segurola* v. *United States*, *supra*, this Court referred to a controversy of this kind in the following language:

> "The Court will not in trying a criminal cause permit a *collateral issue* to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which happened to cross the path of such litigation and which is *wholly independent* of it."

These are the general principles. We shall now discuss cases applying these rules to applications for the return of seized property.

Controlling Authorities Distinguished on Untenable Grounds.

This Court has four times held orders granting or refusing applications for the return of papers or property final and appealable. *Perlman* v. *United States*, 247 U. S. 7, *Burdeau* v. *McDowell*, 256 U. S. 465, *Essgee Company* v. *United States*, 262 U. S. 151, and *Steele* v. *United States*, 267 U. S. 498.

The Court below has not to any appreciable extent discussed the theory of this Court in those decisions or

discussed the true nature of "final" orders, but has rather endeavored to demonstrate, by refined analysis, that this case is not in all respects the same as those, failing, nevertheless, to give reasons why the distinctions discovered should control.

Classes of Orders Conceded to be Final and Appealable.

The Court below concedes:

1. That where an application is made for the return of seized property then in the possession of prosecuting officers, and at the time no indictment against the applicant is pending, an order granting or denying the application is final and appealable. *Perlman* v. *United States, supra*; *Burdeau* v. *McDowell, supra*.

2. That where an application is made for the return of property seized under a search warrant, and an indictment is pending against the applicant, an order granting or denying the application is final and appealable. *Steele* v. *United States, No. 1, supra*.

3. That where an application is made for the return of property produced under a subpoena *duces tecum*, and an indictment is pending, an order granting or denying the application is final and appealable. *Essgee Co.* v. *United States, supra*.

BUT, SAYS THE COURT BELOW, IF AN INDICTMENT IS PENDING, AND NO COURT WRIT HAD BEEN ISSUED, THE ORDER IS INTERLOCUTORY AND NOT APPEALABLE.

Pendency of an indictment is no more material where a court writ hasn't issued than where it has, and the Sixth Circuit Court of Appeals has so held.

In *Perlman v. United States*, exhibits produced by Perlman upon the trial of a civil case were impounded by an order of the Court. Thereafter the United States Attorney applied for possession of the exhibits as material and necessary "*in an investigation pending before the grand jury*" (247 U. S. 10), and in response the Court issued an order affording the United States Attorney access to the exhibits and directing the Clerk of the Court to produce the exhibits before the Grand Jury upon the United States Attorney's demand. Thereafter Perlman prayed that the use of the exhibits by the United States Attorney be forbidden. The prayer was denied by an order of the District Court from which Perlman sued out a writ of error.

The Court said (247 U. S. 12, 13):

> "The second contention of the Government is somewhat strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a proceeding not yet brought and depending on it to be brought. In other words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur."

That is, the order authorizing the United States Attorney to use the exhibits in the "investigation pending before the grand jury" was final.

PERLMAN DID NOT HAVE TO WAIT UNTIL THE PENDING PROCEEDING HAD RESULTED IN A JUDGMENT OF CONVICTION AGAINST HIM BEFORE SEEKING REVIEW

In *Burdeau* v. *McDowell*, *supra*, the Court said (p. 475):

> "The exact question to be decided here is: May the Government retain incriminating papers, coming to it in the manner described, with a view to their use in a subsequent investigation by a Grand Jury where such papers will be part of the evidence against the accused, and may be used against him upon trial should an indictment be returned?"

This Court reviewed and reversed the District Court order granting a return of the papers.

Although of course no proceeding was pending at the time of the application the Court below goes a long way in saying that the *Burdeau* case does not hold that an order granting or denying return of seized papers is not a final order. Certainly the spirit and tenor of the *Burdeau* and *Perlman* cases is that such an application is a special proceeding, and that the order determining who is entitled to the papers or other property is final.

IS THERE A WORD IN EITHER OPINION THAT INTIMATES THAT IF AN INDICTMENT HAD BEEN PENDING THE REVIEW WOULD BE IMPOSSIBLE? THE COURT CITES NONE AND COUNSEL HAS FOUND NONE.

Our view is confirmed by two opinions of the Circuit Court of Appeals for the Sixth Circuit, in *McDaniel* v. *United States*, 294 Fed. 769, and *Dowling* v. *Collins*, 10 Fed. (2d) 62.

In the *McDaniel* case a federal postal inspector obtained from an Indiana state court a search warrant directed to a municipal police officer. McDaniel's papers were seized under this search warrant. He was indicted and tried. Upon the trial he objected to the introduction in evidence of these papers upon the ground that the search and seizure had been in violation of his Constitutional Rights. The Court stated the rule that a Court will not interrupt a trial to inquire into how evidence otherwise admissible was obtained, and then said:

"It was held that a departure from the rule was justified if the search and seizure were in fact made by United States officers or agents in violation of the Fourth Amendment and a seasonable and timely application were made in advance of trial for the suppression of evidence thus wrongfully obtained and for a return of the seized documents. However, it has been later held in *Perlman* v. *United States*, 247 U. S. 7, 38 Sup. Ct. 417, 62 L. Ed. 950, *that an order granting or refusing such an application is a final and appealable order*, and in *Burdeau* v. *McDowell*, 256 U. S. 465, 41 Sup. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 1159, *an appeal from such an order was permitted on behalf of the government*. If there is an inconsistency in permitting a final and appealable order to be later re-examined collaterally and disregarded, it seems to have passed unnoticed" (294 Fed. 769, 774).

Although not in so many words the Court plainly shows that it regards the *Perlman* and *Burdeau* cases as holding that orders on such applications, if made in advance of *trial*, not of indictment, and not involving the District Court's own writ (it was a *state* court search warrant) are final and appealable.

Again in the *Hoeling* case, *supra*, the Sixth Circuit Court of Appeals showed the same opinion.

In the District Court for the Eastern District of Kentucky, a defendant in a criminal case, *indictment pending*, moved separately for the return of property seized under a search warrant and the suppression of its use as evidence. The two motions were joined, and an order denying both motions on the merits was entered. The defendant was subsequently tried, but the outcome of the trial does not appear.

Thereafter defendant applied to the Court for the return of this property. The District Court denied the

application on the ground that the prior order, being final and appealable was *res adjudicata*.

This view was sustained by the Sixth Circuit Court of Appeals. It said (10 Fed. (2d) 62, 64):

> "The reasoning of the opinion in *Perlman* v. *United States*, 247 U. S. 7, as well as in *Burdeau* v. *McDowell*, 256 U. S. 465, fully supports the conclusion that *the orders on the preliminary motions and petitions in the criminal case were final and as such reviewable in this Court, though entitled in that case they were no essential part of the trial thereon; as preliminary matters they were as independent therefrom as were the petitions in the Perlman and Burdeau cases.*"

Concededly at the time the preliminary application was denied an indictment against the applicant was pending.

The Court below has distinguished the *Harding* case on the ground that the order was final because the vacating of a search warrant was involved. Yet the Sixth Circuit Court of Appeals relied *solely* on decisions of this Court *not involving search warrants or other writs* in holding the order final.

The Court below also distinguishes *Harding* v. *Collins*, by saying that the property there involved had a value other than evidentiary. The property was contraband liquor which certainly has no marketable value. Books and papers of account have no marketable value, but they are extremely valuable to their owners. Where is the line to be drawn? The suggestion of the Court below is a novel one and finds no support in any authority counsel could discover, and certainly finds none in the cases here discussed.

In the *Essgee Company* case a subpoena *duces tecum* had been served on an officer (one Schratter) of a corporation, commanding him to produce certain corporate

papers at the U. S. Courthouse. This he did, and left them on a table where the United States Attorney found them and took them. The papers were brought before the Grand Jury and Schratter was subsequently indicted. Indictment pending Schratter applied for a return of the papers. The decision on the application seems to have involved the propriety of the subpoena, but the application was certainly not directed at the subpoena nor did it involve vacating, quashing or otherwise disposing of the subpoena. It was purely and simply an effort to get back papers which the United States Attorney had for the purpose of prosecuting the applicant.

The Court below has said (R., 17):

> "* * * the case is in any event to be distinguished in that the motion was for the determination of a proceeding commenced by the court's writ."

The determination was *not* of a proceeding commenced by the court's writ.

The proceeding had been commenced by the appellant's application for the return of papers which the United States Attorney had; he happened to have them because of a subpoena served months before.

The Court's implication is that the proceeding was one to vacate a court's writ, but, of course, that is not the case.

The *Segurola* case shows that this Court attaches no importance to the pendency of an indictment or connection with a court writ.

In *Segurola* v. *United States*, *supra*, this Court showed that it did not consider applications for the return of seized property as any more an integral part of a

main criminal case when no search warrant, subpoena or other writ was involved. In that case Segurola had been searched without a warrant and property in his possession seized. Without previous application he objected to its introduction at the trial.

This Court said:

> "The Court will not in trying a criminal case permit a *collateral* issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which happened to cross the path of such litigation and *which is wholly independent of it.*"

In an involved suit it is not unusual that a controversy arises between some or all of the parties on a matter separate from the issues raised by the pleading. In equity receiverships, for instance, such separate controversies are constant—this or that property is sold, allowances are made, and so on. The final determination of the Court of first instance in these incidental matters is appealable.

Under the doctrine of this Court in that well known series of cases, *Boyd* v. *United States*, 116 U. S. 616, *Weeks* vs. *United States*, 232 U. S. 383, *Gouled* v. *United States*, 255 U. S. 298 and others, applications for the return of property possessed by prosecuting officers, have become well-defined proceedings of frequent occurrence in the District Courts. Sometimes these applications are made before indictment, sometimes after. Sometimes the applicant is the only person proceeded against, or to be proceeded against (*Perlman* case); sometimes, as here, only one of the defendants is interested in the application. Sometimes the property in question has been obtained under a search warrant; sometimes because a party has been coerced by subpoena; sometimes it has merely been seized, as here, and as in the *Segurola* case.

In the *Essgee Company* case these proceedings were briefly described as follows (p. 152):

> "The review sought is of an order of the District Court in which no jury can intervene. It likens itself in its appellate character to a review of cases in equity or admiralty in which issues of fact are triable to the court, and in which the review may properly involve a re-examination by the reviewing court of the whole record of the court upon both the law and the evidence therein."

These proceedings determine who, as between the prosecuting officer and the applicant, is entitled to the property, the subject matter of the application. It is quite apart from the general issue—which here is whether or not petitioner and others were conspirators against the laws of the United States.

The opinion of the Court below shows it has confused these principles. A controversy does not become the less a special proceeding because some more important issue is pending between the parties, nor does the incidental fact that the merit of some court writ is questioned introduce some strange magic which gives the order determining the controversy an appealable character.

The theory urged by counsel harmonizes the decisions of the Court and has been adopted by the Circuit Court of Appeals of the Sixth Circuit.

Whatever may be said as to factual distinctions between this case and *Doubling* v. *Collins*, it is clear from the opinion in that case that the Circuit Court of Appeals of the Sixth Circuit regards orders on applications for the return of property seized as final and appealable.

We quote again from the *Doubling* case (p. 64):

> "The reasoning of the opinion in *Perlman* v. *United States*, 247 U. S. 7, as well as in *Burdeau*

> v. *McDowell*, 256 U. S. 465, fully supports the conclusion that the orders on the preliminary motions and petitions in the criminal case were final and as such reviewable in this court; though entitled in that criminal case, they were no essential part of the trial therein; as preliminary matters they were as independent therefrom as were the petitions in the *Perlman* and *Burdeau* cases."

In the *Dowling* case an indictment was pending at the time the application was made. By citing decisions of this Court in cases in which no indictment was pending at the time of the order, the Court shows that it does not think the pendency of an indictment changes the final character of the order. Although a writ was involved in the *Dowling* case, no writ was involved in the authorities cited, so that the Sixth Circuit Court of Appeals does not think that a material feature.

Although presumably a defendant could eventually obtain review on the merits in an Appellate Court, the same can not be said of the Government.

If an application like the present is granted, in very many cases it will mean that the evidence is insufficient to obtain a conviction and the prosecution will fail, unless the order is reversed.

But if appeal does not lie, the order can not be reversed and the prosecution will fail without the Government's having had an opportunity for review.

Take *Burdeau* v. *McDowell*. Suppose there the application had not been made until after indictment. In that case the District Judge granted the application. The Government would never have been able to obtain review and the prosecution would have failed, and wrongfully, because the District Court's order was erroneous.

The present decision in connection with the rule recently insisted upon in *Segurola v. United States* will cause confusion.

In *Segurola* v. *United States*, *supra*, it appeared that property of a defendant in a criminal case had been seized at the time of his arrest, unconstitutionally, he thought. There was no search warrant. At the time of the trial he objected to the seizure for the first time by opposing the introduction of this property in evidence, but it was admitted. This Court said:

> "* * * The court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which happened to cross the path of such litigation and which is wholly independent of it. In other words in order to raise the question of illegal seizure, and an absence of probable cause in that seizure, the defendants should have moved to have the liquor returned to them as their property and as not subject to seizure or use as evidence."

Let us suppose the defendant does make such a motion and it is denied.

Then, how is the defendant to obtain review?

He cannot raise the question at the trial so his bill of exceptions will not show his grievance.

Nor, if the decision of the Court below is right may he appeal direct.

Suppose the defendant is acquitted at the trial.

How is he to get his property back? He cannot appeal from the order denying his application; he cannot appeal from a judgment of acquittal.

Suppose the defendant is convicted. There is great uncertainty, as outlined above, as to how to protect his rights.

Moreover, it is extremely difficult, if not impossible, for the petitioner to protect the rights given him under the decision of this Court in *Silverthorn Lumber Company* v. *United States*, 251 U. S. 385, the doctrine of which case forbids prosecuting officers not only to introduce wrongfully seized property, but to use in a prosecution information which they may have derived from property wrongfully seized. How is the petitioner Cogen to know when testimony is produced at the trial whether or not the Government was able to obtain such testimony from information which it obtained by examining these papers? If the petitioner Cogen's rights are to be fully protected it will be necessary, continually, to inquire whether or not the testimony offered was so obtained, and, certainly, such inquiries would cause "halts in the orderly progress of a cause" more disturbing and more embarrassing than those which this Court said in the *Segurola* case must be avoided.

The government presented a brief in opposition to the application for certiorari herein and argued that the decision of the Court below was right. The theory advocated by the Government was adopted by Judge Manton in his concurring opinion. This theory was expressly rejected by the majority of the Court.

This theory is, quoting from page 4 of the Government brief in opposition to certiorari, that:

> "Where an application for the return of seized property and for its suppression as evidence is in substance and effect a proceeding in a pending case, *as distinguished from a proceeding begun by an independent petition*, the order granting or denying the relief prayed is but interlocutory in a pending case and therefore not appealable."

The opinion of Judge Learned Hand reads, (R., 16):

> "This case comes up upon motion in the criminal prosecution then pending, and while *we attach no significance to the way the papers are entitled*, it is plain that *unless the motion lay as an independent proceeding*, it was but a step in the defense and the order is not a 'final decision.'"

Judge Manton in his separate opinion agreed with the Government's present contention,* saying (R., 18):

> "The application for their return as unlawful in violation of the constitutional rights of this plaintiff in error was prosecuted as an incident to the pending criminal proceedings. If it were an independent proceeding, the order is final and appealable."

The distinction is highly important. If the Government and Judge Manton are right, persons deprived of property are entitled to appellate review if they proceed in the right way, even if indictment is pending and no court writ involved.

Different Treatment of the *Essgee* Case.

This distinction is strikingly illustrated by the different ways in which Judge Hand and the Government treat *Essgee Co.* v. *United States*, 262 U. S. 151. In this case a Grand Jury subpoena *duces tecum* had been served on the Essgee Company. No one appeared before the Grand Jury but an officer of the corporation left papers in a room in the Courthouse, where the District Attorney found them. Months later the corporation was indicted and then petitioned for a return of the papers. The petition was not directed at the sub-

*The case was argued for the Government on a different basis in the Court below.

poena, but in the petition the claim was made that the subpoena was invalid. The order in the case was reviewed by this Court on appeal.

Now, Judge Hand, distinguishes the *Essgee* case from the present on the ground that it was an order disposing of a court writ. We believe we have already shown that Judge Hand was wrong on his facts in making this distinction; apparently the Government thinks little of this theory, but relies upon the difference in procedure. We quote below the varying treatments of the *Essgee* case in parallel columns:

Government Brief in opposition to Certiorari (page 9, Brief):

"In *Essgee Co.* v. *United States*, the petitions for the return of books and papers were filed after indictments had been returned against petitioners. The petitions were not entitled as in the criminal cases, however, but were plainly intended by the petitioners and treated by the court as the beginning of new and independent proceedings. The orders denying the petitions were, therefore, obviously final and reviewable in this Court."

Judge Hand (R., 17, Opinion, C. C. A.):

"In *Essgee Company* v. *U. S.*, 262 U. S. 151, an order was reviewed which after indictment denied the return of papers produced in compliance with a subpoena *duces tecum* issued by the Grand Jury. The point was again assumed without discussion, and the case is in any event to be distinguished in that the motion was a determination of a proceeding commenced by the court's writ. In this regard it was like a search warrant, though issuing as of course. No doubt a court has always supervision over the execution of its writs, *Wise* v. *Henkel*, 220 U. S. 556, 558, and its orders may perhaps be treated as final which dispose of them."

In page 11 of the Government Brief in opposition to certiorari it is claimed that no question of jurisdiction was raised in the *Essgee* case. This is erroneous as the first point raised by the Solicitor-General was that the order was interlocutory and not reviewable.

Different Treatment of the *Steele* Case; but Both the Government and Judge Hand Wrong on the Facts.

The *Steele* case is also distinguished on different grounds; Judge Hand on the court writ theory, the Government on the independent petition theory. We believe Judge Hand entirely wrong on his facts in his differentiation of the *Steele* case—the order was *not* made on the return of the executing officer to the judge or commissioner allowing the writ.

The Government is also wrong on its facts, but on different facts. The application in the *Steele* case was made on affidavits in the same manner that this case was. The moving paper appears on page 4 of the Record in this Court in that case. It is called "Notice of Motion" and reads as follows: "Upon the annexed petition* of Meyer Kraushaar, verified the 30th day of October, 1923, and upon the affidavit of Isidor Einstein, etc. * * * the undersigned will *move this Court* * * * on the fifth day of November, 1923 * * * for an order" granting the relief prayed, and is addressed to the United States Attorney and Commissioner Hitchcock.

The proceeding was certainly not an appellate one; it was a motion on affidavits and deposition, for the return of property.

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*Although called a petition it is in affidavit form, annexed to the notice of motion and certainly is not a pleading in Steele's name.

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*The motion was furthermore returnable in the Courtroom for criminal motions, not the one for civil motions.

Different Results Reached in Applying Theories of Government and of the Court Below.

According to the Government and Judge Manton the following orders are final:

Orders made in entirely separate equitable cases, irrespective of court writs involved, or the pendency of indictments.

According to the majority of the Court below the following are final:

Orders in independent equitable actions, *where no indictment is pending.*

Orders made on motion or in entirely separate equitable cases, if involving a court writ.

But orders made in separate equitable cases are interlocutory if no court writ is involved and an indictment is pending.

THE WHOLE POINT OF THE *SEGUROLA* CASE WILL BE LOST IF THE GOVERNMENT'S CONTENTION IS UPHELD.

On page 11 of the Government brief in opposition to certiorari it is pointed out that if petitioner is right, and the order is final, "all questions involving the validity of the seizure would be *res adjudicata* and could not again be passed on by the court in considering objections at the trial."

This is exactly what we contend, and we think it is necessarily involved in the decision in the *Segurola* case.

The Court in that case, if we understand it correctly, intended to prevent the disturbance of the progress of criminal trials by long inquiries into the competency of evidence offered. Clearly such disturbance can only be prevented if the question has been finally settled. We do not regard, as the Government seems to, a preliminary application as a sort of ritual to be gone through with if one is to be in a position to object to evidence

at the trial, and then go through the whole thing over again, yet that is the only basis upon which the Government's theory that these orders are not final can be reconciled with the firm requirement of this Court that a preliminary application be made.

For instance, if the order in this case is not final then the whole question will have to be gone into at the trial, and evidence taken on the issue of probable cause,* if petitioner's rights are to be protected. This is clearly inconsistent with the theory of the *Segurola* case and if unreversed, makes it difficult to see how this petitioner's rights can be protected.

The following language of this Court in the *Steele* case supports our theory (p. 507):

> "It should first be said that *Steele* is not in a position to raise this question. He might have raised it in the preceding case, but he did not do so, and did not assign error on account of it in his appeal to this Court. *The refusal to vacate the Search Warrant and to return the liquor seized was a final decree. The question is therefore res adjudicata as against him.*"

CONCLUSION.

The decree of the Circuit Court of Appeals should be reversed.

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*Counsel was present at a criminal trial in the District Court of the United States for the Southern District of New York when the Court spent a whole day inquiring into the source of evidence, bound it supposed, by the *Amos* case.